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Wilshire at Lakewood and Lisa Jochims. Case 17–CA–21564

September 30, 2005

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On September 30, 2004, the National Labor Relations Board issued a Decision and Order¹ in this proceeding. Reversing the Administrative Law Judge's findings, the Board found in relevant part that registered nurse (RN) Lisa Jochims was not a statutory supervisor within the meaning of Section 2(11) of the Act and, therefore, the Respondent's termination of, and other conduct towards, Jochims for circulating a petition protesting a change in working conditions violated Section 8(a)(1) of the Act as alleged.²

Thereafter, on October 14, 2004, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the Eighth Circuit. Subsequently, the Board informed the parties and the court that it had decided, sua sponte, to reconsider its Decision and Order.

After reconsideration, and for the reasons set forth below, we have decided to reverse our prior finding that Jochims is not a statutory supervisor within the meaning of Section 2(11) of the Act. We find that she is a supervisor, and we will therefore dismiss the 8(a)(1) allegations that are dependent upon a finding that Jochims is a statutory employee. Accordingly, we shall vacate the Board's original order in this proceeding and issue a new order as modified and set forth in full below.³

¹ 343 NLRB No. 23 (2004). Chairman Battista dissented to these findings. Member Schaumber did not participate in that decision.

² Specifically, in addition to finding that Jochims' termination was unlawful, the Board found that the Respondent violated Sec. 8(a)(1) by (a) terminating Jochims for circulating a petition protesting a proposed change in working conditions; (b) telling Jochims that she was terminated for circulating the petition; (c) disparately prohibiting Jochims from telephoning nurses at the facility; (d) asking Jochims about the petition and thereby creating the impression of surveillance; and (e) disparately enforcing a no-solicitation, no-distribution rule against Jochims. The Board found that all of these findings turned on whether Jochims was a supervisor excluded from the Act's protections.

³ In all other respects, however, we reaffirm the Board's findings in the original decision.

In addition to modifying the original order consistent with our findings herein, we shall also include in the new order the appropriate remedial language for the findings that the Respondent violated Sec. 8(a)(1) by maintaining certain unlawful handbook rules. See *Guardsmark, LLC*, 344 NLRB No. 97 (2005).

At the outset, we note that the Board's original decision found the record evidence insufficient to establish that Jochims exercised independent judgment to responsibly direct employees "under any interpretation" of *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). We recognize that this finding, without further explanation, could raise a substantial issue before the Eighth Circuit as to whether there is a clearly articulated rationale for the finding that Jochims is not a supervisor. See *Multimedia KSDK, Inc. v. NLRB*, 303 F.3d 896, 899 (8th Cir. 2002) ("The brevity of the Board's one-paragraph decision makes it somewhat difficult to determine what theory the Board used as the basis of its order."). However, after reconsidering the record, we find it unnecessary to pass on that issue, because we find, as explained below, that Jochims possessed supervisory authority apart from the issue of her responsible direction of employees.⁴

The pertinent facts relating to Jochims' supervisory status, set forth in full in the underlying Decision and Order, are as follows: RN Lisa Jochims was the Respondent's "weekend supervisor" and, as such, was the highest ranking and highest paid person on the Respondent's weekend staff. Although responsible for patient care and interaction with patients' families, Jochims also attended managerial meetings and was responsible for assuring proper employee staffing, time, and attendance. In addition, Jochims' duties included checking to see whether employees performed their tasks correctly, and correcting employees if they did something wrong. In so doing, if Jochims determined that an employee committed a gross infraction of residential care, she could, at her discretion, document the infraction on a disciplinary form. This disciplinary writeup would initiate further review by managerial officials, as well as a determination of whether further disciplinary action against the employee was warranted.

In addition, on at least two occasions, Jochims orally reported that an employee was unfit for work. In one of these instances, Jochims reported to the Respondent's Administrator that a licensed practical nurse came to work intoxicated, and in the other instance she reported to the director of nursing that a certified nursing assistant was taking extended breaks and was failing to respond to patient call lights. In each of these discussions with the management officials, the decision was made by the ad-

⁴ The dissent mischaracterizes our decision to not pass on this issue as one of avoidance, even though it is clear that our resolution of the *Kentucky River* issue here would have no effect on our finding that Jochims is a supervisor, and would only serve to unnecessarily delay this decision pending the Board's resolution of the issue left open by the Supreme Court's decision.

ministrator to send these employees home, and Jochims instructed the offending employees to leave.

Jochims has also granted employee requests to leave work early. On two occasions, Jochims was presented with an employee request to leave before the end of the shift to attend to a family emergency. In both instances, Jochims independently granted the requests.

Jochims also evaluated an employee's performance. As a result of this evaluation, the employee was determined to have successfully completed her 90-day probationary period.

In view of the above facts, we find, contrary to the Board's original decision, that Jochims possessed supervisory authority within the meaning of Section 2(11) of the Act. First, with respect to employee discipline, Jochims' authority to correct employee infractions included the ability to issue, at her discretion, a disciplinary writeup of the infraction. These writeups, placed in the employee's personnel file, constitute the first step in the process for possible discipline. While the Board's original decision found little significance to these writeups insofar as they did not necessarily lead to further disciplinary action in every instance, the fact remains that these writeups play a significant role in the disciplinary process, and they are initiated by Jochims' independent determination that the committed infraction is egregious enough to warrant the writeup. In these circumstances, the writeups clearly evince Jochims' supervisory status.⁵

In addition, the record establishes that Jochims exercised independent judgment in sending employees home. As noted above, on two occasions Jochims independently initiated discussions with managerial officials after observing employee misconduct, and these discussions led to Jochims sending the employees home. Further, on two other occasions Jochims independently granted employee requests to leave early to attend to personal matters. In each of these incidents, it was Jochims' exercise of independent judgment that led to the early departure of the employee. Thus, we find that the Board's original decision erred in finding that these acts do not demon-

strate the existence of supervisory authority.⁶ Finally, Jochims' evaluation of an employee's performance lends further support to the conclusion that Jochims is a supervisor.

Jochims also possesses secondary indicia of supervisory authority (i.e., her supervisory title, the fact that she is the highest ranking and highest paid person at the facility on the weekends, and her attendance at managerial meetings). These indicia constitute further evidence of her supervisory status. Although the Board's decision found little significance to these facts because they were insufficient to confer supervisory status standing on their own, we find that—considered together with the other instances of supervisory authority discussed above—they provide corroborating evidence of Jochims' supervisory status.

Our dissenting colleague adheres to the underlying majority decision which found that Jochims was not a supervisor. In so doing, the dissent contends that (a) the evidence of Jochims' issuance of disciplinary writeups, of sending employees home, and of preparing an employee's performance evaluation demonstrates nothing more than a reportorial function; and (b) the evidence of Jochims allowing employees to leave early constitutes nothing more than "isolated and exigent circumstances." As explained below, we find no merit to our colleague's contentions.

Our colleague accuses us of ignoring the precedent that a mere reporting of facts, without a recommendation, does not establish supervisory status. We agree with that precedent, and we do not ignore it. We simply conclude that the instant case involves far more authority than the mere reporting of facts. In the first place, Jochims exercised independent judgment in deciding *whether* to writeup an employee at all for a particular infraction. If

⁵ We thus find, contrary to the dissent's contention, that the Board's reliance in its original decision on *Asuza Ranch Market*, 321 NLRB 811, 812–813 (1996), and *Passavant Health Center*, 284 NLRB 887, 889 (1987), is unavailing. There was no finding in those cases, as here, that the disciplinary writeups played any significant role in the disciplinary process. In addition, we find, without passing on whether they were correctly decided, that *Ken-Crest Services*, 335 NLRB 777 (2001), and *Fleming Cos.*, 330 NLRB 277 (1999), cited in the Board's original decision, are distinguishable. In *Ken-Crest Services*, the Board found that the verbal warnings at issue there had "no clear connection of any kind to other disciplinary measures." 335 NLRB at 778. In *Fleming Cos.*, the Board found that the issuance of the subject disciplinary warnings for attendance violations did not involve the exercise of any discretion. 330 NLRB 277 at fn. 1.

⁶ We find that *Alois Box Co.*, 326 NLRB 1177, 1177–1178 (1998), enfd. 216 F. 3d 69 (D.C. Cir. 2000), cited in support by the majority in the original decision, is distinguishable, as the person whose supervisory status was at issue did not have authority to make independent decisions affecting other employees, but rather only served as a "conduit for management instructions." Here, as shown above, it is Jochims' exercise of independent judgment that caused two employees to be sent home for disciplinary reasons, and she independently granted two other employees permission to go home early.

We similarly find unavailing the dissent's reliance on *NLRB v. St. Clair Die Casting, LLC*, ___ F.3d ___, No. 04-420, slip op. at 9–10, 2005 WL 2206803 at *5 (8th Cir. Sept. 13, 2005). In that case, the employer argued that four "setup specialists" were supervisors—in part—because of their authority to issue "secondary disciplinary warning forms" to report employee rule violations. The employer's argument was found to have no merit because the record showed that (a) these warning forms were not part of the employer's formal disciplinary system, (b) not all of the setup specialists were even aware of the existence of such a form, and (c) only one of the setup specialists had actually ever filled out or signed such a form.

Jochims chose not to, there would be no discipline. Secondly, if she chose to do so, her submission of the report triggered a disciplinary process.

The cases on which the dissent relies are unavailing. *Ohio Masonic Home*, 295 NLRB 390 (1989), is clearly distinguishable. In that case, the disciplinary warnings were not issued by the subject nurses until after the nurses contacted their supervisor about the particular infraction. Here, the record shows that Jochims did not contact her superior prior to issuing the writeups; the decisions to issue the writeups were completely hers. Similarly, *Vencor Hospita—Los Angeles*, 328 NLRB 1136, 1139 (1999), is distinguishable inasmuch as the Board found no evidence that the issuance of written warnings involved the exercise of any independent judgment.

In addition, the dissent erroneously contends that our decision today is somehow at odds with our recent decision in *Mountaineer Park, Inc.*, 343 NLRB No. 135 (2004), where we found that the issuance of disciplinary writeups evinced supervisory status. According to the dissent, because we found that the writeups in *Mountaineer Park* included an effective recommendation of discipline, our finding here is inconsistent with that decision. The simple answer is that the writeup in *Mountaineer Park* involved an effective recommendation of discipline, and Jochims' writeups were more than a recommendation; the decision to issue a writeup actually initiated the disciplinary process. Contrary to our colleague's contention, the exercise of independent judgment in initiating an employer's disciplinary process constitutes a substantial role in the decision to discipline, and is indeed indicative of supervisory authority. See *Progressive Transportation Services*, 340 NLRB 1044, 1046 (2003) (individual, found to be supervisor, "use[d] independent judgment in deciding whether to initiate disciplinary process");⁷ *Mountaineer Park, Inc.*, supra, slip op. at 3 (individuals found to be supervisors had the authority "to decide whether to trigger the disciplinary process").

Our colleague apparently believes that the powers listed in Section 2(11) are supervisory only if they are exercised in an affirmative way. That is, a decision to discipline is supervisory, but a decision not to do so is not. We do not read Section 2(11) in that limited way. For example, a decision to deny a wage increase or to deny a grievance clearly affects the terms and conditions

of employees. Reasonably read, Section 2(11) deals with the authority to decide *whether* to take the actions listed therein. As shown, Jochims had the power to decide not to initiate the disciplinary process.

Our colleague also asserts that, under our decision today, "we soon [will] have no employees, only supervisors" because any employee would become a supervisor whenever the employee decided to report a coworker's infraction. This assertion, is at odds with the circumstances presented here, i.e., Jochims was specifically vested with the authority to exercise independent judgment in deciding whether to initiate the Respondent's formal disciplinary process. This is completely distinguishable from a situation involving an employee—vested with no such authority—who decides on his or her own to report misconduct.⁸

Similarly, with respect to the evidence of Jochims sending two employees home for misconduct, the dissent erroneously focuses only on whether there was a recommendation for discipline, and not on the fact that Jochims exercised independent judgment in initiating the process that led to the employees being sent home.

As to Jochims' granting permission for employees to leave work early, the dissent characterizes these incidents as exigent circumstances that did not require Jochims' approval. However, the evidence shows otherwise, as the employees sought Jochims' permission to leave early, Jochims exercised independent judgment in granting the employees' request, and the employees left work only after permission was granted by Jochims.

Finally, with respect to Jochims' preparation of an evaluation, the dissent claims that this single incident is not sufficient to confer supervisory status. Were this the only evidence of Jochims' supervisory status, we might agree. However, when considered together with the other evidence of supervisory status discussed above, the evaluation constitutes further support for the supervisory finding.

In sum, Jochims' exercise of independent judgment in issuing disciplinary writeups, in sending employees home early and in preparing an employee evaluation, together with her possession of secondary indicia, establish that Jochims was a statutory supervisor. Consequently, her conduct was not protected by the Act. Therefore, the Respondent's conduct, taken in response to her circulation of a petition, including her termination, did not violate Section 8(a)(1) of the Act as alleged. Ac-

⁷ Our colleague says that the Board, in *Progressive*, relied "exclusively" on the authority to effectively recommend discipline and the absence of an independent investigation by the superior. However, the fact is that the Board explicitly relied, in part, on the use of "independent judgment in deciding whether to initiate the discipline process."

⁸ Contrary to our colleague's assertion, we do not say that the authority to decide whether to report an infraction makes a person a supervisor. Rather, we say that a person who is responsible for deciding whether to report an infraction, which report will initiate a disciplinary process, has supervisory authority.

cordingly, we shall vacate the Board's original order and dismiss the complaint allegations relating to the Respondent's termination of Jochims and the other conduct engaged in as a result of Jochims' unprotected activity.

ORDER

The National Labor Relations Board orders that the Respondent, Wilshire at Lakewood, Lee's Summit, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their own or others' protected concerted activities.

(b) Creating an impression among its employees that their protected concerted activities are under surveillance.

(c) Maintaining in its employee handbook a disciplinary rule prohibiting the misrepresentation of a material fact in an attempt to obtain a benefit or advantage.

(d) Maintaining in its employee handbook a disciplinary rule prohibiting making a false or malicious statement about a resident, employee, supervisor, or the Company.

(e) Maintaining in its employee handbook a disciplinary rule prohibiting paycheck disclosure.

(f) Maintaining in its employee handbook a disciplinary rule that prohibits soliciting or distributing material during working time or in any work area or resident care area.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the disciplinary rules quoted above.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised handbooks that (1) do not contain the unlawful rules, or (2) provide the language of the lawful rules.

(c) Within 14 days after service by the Region, post at its Lee's Summit, Missouri facility copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are cus-

tomarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Board's Order reported at 343 NLRB No. 23 is vacated.

IT IS FURTHER ORDERED that in all other respects the complaint is dismissed.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

"Filling out forms related to performance issues, without more, does not qualify employees for supervisory status."¹ The majority, in reconsidering the Board's earlier finding that Lisa Jochims is not a statutory supervisor, reverses our prior decision on facts that essentially show no more than that Jochims reports information to management officials, who themselves determine what further steps to take with respect to discipline and performance issues. Such bare reporting of information has never provided the basis for finding supervisory status—until now. The language of Section 2(11) of the Act defining supervisory status requires that the person be shown to have authority to act in discrete areas of responsibility, or to make "effective recommendations" on these matters. The reports provided by Jochims, now relied on by the majority, clearly contain no recommendations whatsoever and they do not themselves represent adverse action. Nor do they lead with any predictability to discipline. Significantly, the majority never concludes

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ *Hospital General Menonita v. NLRB*, 393 F.3d 263, 267 (1st Cir. 2004), *enfd.* 340 NLRB 1050 (2003).

that Jochims effectively recommends discipline. Accordingly, the majority has no basis to reverse the Board's prior decision.

I.

The majority accurately depicts the nature of Jochims' reporting responsibility. She is responsible for checking on employees' performance when she works as the sole RN on weekends at the Respondent's nursing facility, and can correct employees if they do something wrong. If she determines that an employee has committed a gross infraction of residential care, she may choose to document the matter on a form.² The forms in evidence contain no recommendations as to discipline. These write-ups initiate further review by managerial officials, as well as a determination of whether any disciplinary action is warranted. The record does not clarify the nature of this review, although there is no evidence that Jochims is involved after the reporting document is forwarded. Several of the forms submitted by Jochims make no reference to there being any subsequent corrective or disciplinary action, and the relevant testimony fails to clarify what followed from this review by management.

The second type of reporting that Jochims provided to higher management was her oral report of her observations of an employee's fitness for work. In one instance she reported that an employee came to work intoxicated, and in another instance she reported that an employee was taking extended breaks and was failing to respond to patient call lights. There is no evidence that in forwarding this information to management officials, she ever made recommendations as to discipline, nor is there evidence to show that it was Jochims who made the determination as to what further steps to take.³ The record shows no more than that Jochims was later the conduit for relaying decisions made by higher management.

The majority errs by placing determinative importance on its view that these reports "play a significant role in the disciplinary process." Such an ambiguous characterization fails to even begin to comport with the statutory requirement that there be evidence of at least an "effective recommendation."

² The majority characterizes the form as a "disciplinary form". Only one form submitted by Jochims was labeled an employee disciplinary form. All of the other eight forms in evidence are entitled either "employee incident/accident report" or "employee counseling form."

³ The absence of any indication that Jochims was involved in the determination of discipline represents a failure of proof regarding an issue for which the Respondent bore the burden of proof, as it was the party asserting Jochims' supervisory status. See *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

To the contrary, the reporting function in this case is essentially identical to that described in *Ohio Masonic Home*, 295 NLRB 390 (1989), where the Board found no supervisory status under the following facts:

The record shows that nurses do play a role in the Employer's disciplinary system by issuing oral reprimands and written warnings. These warnings consist of factual accounts of alleged incidents of misconduct, but in no way do they include any recommendation for disciplinary action. Although these documents are placed in an employee's personnel file, the record does not establish that these warnings automatically lead to any further discipline or adverse action against an employee. Rather, the director of nursing independently decides when further disciplinary action should be taken. [295 NLRB at 393.]⁴

Under this controlling authority,⁵ the mere fact that Jochims submitted descriptive reports of misconduct is of no particular significance, nor is her purported exercise of discretion in deciding to do so, where no recommendation was ever made as to disciplinary consequences. Thus, the Board's original application of *Asuza Ranch Market*, 321 NLRB 811 (1996), and *Passavant Health Center*, 284 NLRB 887 (1987), remains appropriate.⁶

The majority's position is also in tension with *Mountaineer Park, Inc.*, 343 NLRB No. 135 (2004), where the same majority grounded its finding of supervisory status on there being disciplinary recommendations from the alleged supervisor who had filed the reports of employee misconduct, which they concluded were "effective recommendations" under Section 2(11). The majority in

⁴ The majority attempts to distinguish *Ohio Masonic Home* on its facts, by observing that the nurses there did not prepare written accounts of alleged incidents of misconduct until after some contact with their supervisors. But that fact is irrelevant to the clear holding of the decision: that merely reporting such incidents does not constitute effective recommendation of discipline.

⁵ See also *Vencor Hospital—Los Angeles*, 328 NLRB 1136, 1139 (1999) (emphasizing lack of any recommendation in reports of misconduct submitted to higher management and lack of evidence that reports automatically led to discipline). Contrary to the majority's attempt to re-rationalize the decision, *Vencor's* statement of the law fully supports my position here.

⁶ The Board's earlier, related reliance on *Ken-Crest Services*, 335 NLRB 777 (2001) (program managers' "limited role in the disciplinary process is nothing more than reportorial"), and *Fleming Cos.*, 330 NLRB 277 (1999) (no supervisory status where employee communicated discipline of employee Stanley Jones only pursuant to management's directive; employee's role as a "mere conduit" for management was insufficient evidence of independent judgment), likewise remain appropriate authority for the conclusion that Jochims is not a supervisor. Accord: *NLRB v. St. Clair Die Casting, LLC*, ___ F.3d ___, No. 04-420, slip op. at 9-10, 2005 WL 2206803 at *5 (8th Cir. Sept. 13, 2005).

Mountaineer Park inferred that the disciplinary recommendations made by the alleged supervisor were “effective recommendations” based on the absence of affirmative evidence of an independent investigation⁷ by the management official who reviewed the report filed by the alleged supervisor. In the present case, there are simply no facts from which to infer that a recommendation was effective, for the simple reason that there was no recommendation at all. If the majority’s rationale in the present case is controlling, the protracted discussion in *Mountaineer Park* as to “effective recommendations” clearly was unnecessary because the write-ups, in any event, would have also “played a significant role in the disciplinary process.”⁸

The majority has not attempted to reconcile these decisions other than to assert that “Jochims’ writeups were more than a recommendation; the decision to issue a writeup actually initiated the disciplinary process.” As explained, of course, the writeups were not direct evidence of discipline themselves, and the Respondent has failed to show how the writeup forms in evidence would lead to discipline after being submitted. If the majority’s view that it need only be shown that the writeup “initiated the disciplinary process” were the law, then the statutory requirement for there to be at least “effective recommendation” would be eliminated. And, if exercising independent judgment in taking action that “initiates” the process that leads to discipline were enough to create supervisory status, there would be no end to the type of employee actions that might be deemed supervisory. For example, any time employees had the discretion to report co-workers’ infractions to management and did so, leading to discipline, the reporting employee arguably would have become a supervisor. Under such an approach, we soon would have no employees, only supervisors. Tellingly, the majority fails to cite any precedent for its

novel, ambiguous, and evidently expansive, criterion for determining supervisory status.⁹

II.

The evidence also shows that Jochims filled out part of a probationary employee’s evaluation—a task which she did not normally do, but which she fulfilled in one instance on request. Although she reported on her observations of the specific employee, and entered a numerical score at the appropriate locations on the form, as requested, she did not make any specific recommendation.

This evidence fails to indicate supervisory status, not only on the basis that there was no showing that Jochims provided any recommendation associated with the evaluation, but also on the basis that the record shows that filling out employee evaluations was not part of her established responsibilities. That fact that she was requested on a single occasion to perform this task outside the scope of her normal responsibilities is inadequate to support a supervisory finding.

III.

The final basis relied on by the majority for finding Jochims to be a supervisor is evidence that she permitted employees to go home early on two occasions. The majority appropriately describes each instance as involving a “family emergency,” but it erroneously characterizes Jochims’ acceptance of the early departure of these employees in those circumstances as the exercise of supervisory responsibility.

As stated in the original decision, the first instance involved an employee who had informed Jochims that the employee’s child had fallen on his head and probably

⁷ The significance of the absence of evidence of an independent investigation formed the basis for Member Walsh’s dissenting opinion in *Mountaineer Park*.

⁸ Similarly, the majority’s reliance on the Board’s divided decision in *Progressive Transportation Services*, 340 NLRB 1044 (2003), is misplaced. Contrary to the majority, the Board there did not merely focus on the alleged supervisor’s role in “initiating” the disciplinary process. Rather, the finding of supervisory status was premised on the express conclusion that the supervisor effectively recommended discipline. The Board explained that “the record shows that when [the supervisor] makes a disciplinary recommendation to [her superior], discipline ensues” and that the superior did not conduct independent investigations. Id. at 1045. Those two facts were specifically, and exclusively, relied upon in rejecting the dissent’s view that the supervisor’s authority was “merely reportorial.” Id. at 1046.

⁹ The majority faults me for focusing on whether there was a recommendation for discipline rather than on whether Jochims exercised independent judgment. If the action taken, however, is not one of the actions listed in Sec. 2(11) of the Act—here an effective recommendation to discipline other employees—it makes no difference whatsoever whether the action involved an exercise of independent judgment: the action is simply not an indicium of supervisory status. The majority confuses matters by asserting that the dispute between us is over whether authority must be “exercised in an affirmative way” in order for it to be supervisory authority under Sec. 2(11). My view is that the authority merely to exercise independent judgment in deciding whether to report, or not report, other employees’ rules infractions, without more, is not Sec. 2(11) authority.

The majority asserts that I ignore that Jochims “was specifically vested with the authority to exercise independent judgment in deciding whether to initiate the Respondent’s formal disciplinary process.” Whatever “specific vesting” the majority may be referring to, it appears that they are suggesting that the authority to exercise independent judgment in deciding whether or not to report other employees’ rules infractions by itself is sufficient to constitute supervisory authority. If this were the case an employer could instantly covert all of its employees into supervisors by issuing a memo stating that all employees are expected to exercise independent judgment in reporting their fellow employees’ rules infractions.

needed to go to the emergency room. The other instance involved an employee who informed Jochims that she had to leave because her child was having an asthma attack. The Board in its original decision appropriately described these as isolated and exigent circumstances involving compelling medical emergencies. The Board appropriately found that the employees' early departure, obviously compelled, was not dependent upon Jochims' approval. The Board did not err in finding this not to be evidence of supervisory responsibility.

IV.

In the absence of any evidence of supervisory responsibility under the primary indicia listed in Section 2(11), the Board in the original decision also correctly found that the secondary indicia of supervisory status, such as Jochims' title or her attendance at management meetings, was not determinative of her status.

V.

The majority's opinion avoids deciding whether Jochims exercised independent judgment to responsibly direct employees and thus need not resolve the issue left open by *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). To avoid this issue, however, the majority departs from Board precedent governing the supervisory criteria that it does rely on. That step is unwise—as is the majority's sua sponte reversal of the Board's original decision in this case. Accordingly, I dissent.

Dated, Washington, D.C. September 30, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you concerning your own or others' protected concerted activities.

WE WILL NOT create the impression that your protected concerted activities are under surveillance.

WE WILL NOT maintain in our employee handbook a disciplinary rule that prohibits the misrepresentation of a material fact in an attempt to obtain a benefit or advantage.

WE WILL NOT maintain in our employee handbook a disciplinary rule prohibiting making a false or malicious statement about a resident, employee, supervisor, or the Company.

WE WILL NOT maintain in our employee handbook a disciplinary rule that prohibits paycheck disclosure.

WE WILL NOT maintain in our employee handbook a disciplinary rule that prohibits soliciting or distributing material during working time or in any work area or resident care area.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the disciplinary rules quoted above.

WE WILL supply all of you with inserts for the current employee handbook that (1) advise you that the unlawful rules have been rescinded or (2) provide the language of lawful rules; or WE WILL publish and distribute revised handbooks that (1) do not contain the unlawful rules or (2) provide the language of lawful rules.

WILSHIRE AT LAKEWOOD